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### **SHOULD EMPLOYERS PARTICIPATE IN EMPLOYMENT INSURANCE PROCEEDINGS? THE ANSWER IS STILL NO!**

#### **Introduction**

Counsel have consistently advised employers to avoid participating in proceedings under the *Employment Insurance Act* because of the potential for a finding of issue estoppel. In other words, employers were advised that there was a substantial risk that the findings and “legal conclusions” in employment insurance proceedings would bind the employer in wrongful dismissal cases before the courts.

While the law has recently shifted in favour of employers, they should still not participate in employment insurance proceedings. The risks of participating substantially outweigh any benefits.

#### **The Jurisprudence**

Until the Supreme Court of Canada’s decision in *Danyluk v. Ainsworth Technologies Inc.*<sup>1</sup>, the courts had no discretion to defeat issue estoppel if the essential elements were met. The Supreme Court of Canada in *Danyluk* held that the doctrine of issue estoppel could not be rigidly applied, and that a judge had the discretion to not apply the doctrine.

*Danyluk* involved a decision by an employment officer pursuant to the *Employment Standards Act*. The employee made a claim for benefits under the statute and subsequently commenced a wrongful dismissal action against the employer. In the court proceedings, the employer sought to rely on the doctrine of issue estoppel to dismiss the employee’s claim. The Court dismissed the employer’s defence of issue estoppel. In addressing the question of issue estoppel, the Court stated that the courts should embark on a two-stage inquiry.

In the first stage, courts must examine the following factors to determine if issue estoppel applies:

- \* the same question must be decided;
- \* the “judicial” decisions which purportedly create the estoppel must be “final”;  
and
- \* the parties to the “judicial” decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

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<sup>1</sup> [2001] 2 S.C.R. 460.

The second stage of the inquiry involves the court assessing whether it should exercise its discretion to not rigidly apply issue estoppel. The factors a court should consider in making this latter assessment are:

- \* the wording of the legislation at issue;
- \* the purpose of the legislation;
- \* the availability of an appeal;
- \* the safeguards available to the parties in the administrative procedure;
- \* the expertise of the administrative decision maker;
- \* the circumstances giving rise to the prior administrative proceedings; and
- \* the potential injustice.

Based on the latter stage of the inquiry, the Supreme Court of Canada exercised its discretion and refused to apply the doctrine of issue estoppel.

While *Danyluk* involved a decision of an employment officer pursuant to the *Employment Standards Act*, the Ontario Superior Court of Justice has on two occasions applied *Danyluk* to relieve an employer from the rigid application of issue estoppel in the context of employment insurance proceedings.

In *D'Aoust v. 1374202 Ontario Inc. (c.o.b. Automotive Edge)*, [2003] O.J. No. 2642 (S.C.J.), the employee claimed that the employer was barred from defending the claim of constructive dismissal because of a determination by an Employment Insurance officer to grant the employee employment insurance benefits. The employee relied on the doctrine of issue estoppel.

The court rejected the employee's argument for two reasons. First, the court found that the employer participated only minimally in the process. As a result, the court held that the employer was not a party to the determination by the Employment Insurance officer. In any event, the court stated that even if the employer's minimal involvement meant that it was a party to the proceedings, the court nevertheless would have exercised its jurisdiction to not apply the doctrine of issue estoppel. At paragraph 51 of the decision, the court stated:

In the circumstances of this case I have no hesitation in concluding that even if all three preconditions to the application of the principle of issue estoppel were met, that such principle should not bar the defendant from its defence in this case. **To conclude in the circumstances that the defendant would be so barred would be unconscionable and contrary to all principles of fairness, natural justice and to common sense.**

The court in *Lemay v. Canada Post Corp.*, [2003] O.J. No. 3052 (S.C.J.) followed the approach taken by the court in *D'Aoust* and refused to apply the doctrine of issue estoppel against the employer. This case concerned a decision by both an Employment Insurance officer and the Board of Referees. The employer participated in both "proceedings". While court concluded that the pre-conditions to the doctrine of issue estoppel were met in this case, the court nevertheless exercised its discretion and did not apply the doctrine.

The court found that the absence of cross-examination was an important factor in the exercise of its discretion. It also held that the employee should not benefit from issue estoppel when the employee himself launched a separate parallel civil action for unjust dismissal. At paragraph 197, the court wrote:

In this particular case, the Plaintiff who seeks the benefit of applying issue estoppel is the party who commenced the separate parallel civil action for unjust dismissal. The underlying purpose of issue estoppel was to protect an individual from vexatious multiplication of suits and to uphold the finality of a decision. This is not the case when the party seeking the benefit has in fact launched the second proceeding and has carried it through to the end of a trial.

## Conclusion

Despite the positive developments in the law of issue estoppel, employers should nevertheless continue to refrain from participating in employment insurance proceedings. Issue estoppel will still *prima facie* arise from employment insurance decisions in most cases. The employer will then have the onus to convince the court to exercise its discretion and not rigidly apply the doctrine of issue estoppel. While the court's decisions in *D'Aoust* and *Lemay* are no doubt helpful, there is no guarantee that other courts will exercise their discretion in a similar fashion. Therefore, the risk of participating and losing before the Employment Insurance Commission still exists. As employers do not derive any direct benefit or harm from the outcome of employment insurance proceedings, employers should not, as a general rule, participate. The benefits simply do not outweigh the risks.

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